STATE OF WISCONSIN
COURT OF APPEALS
District IV
Appeal No. 2021AP001196

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WISCONSIN STATE JOURNAL, JONATHAN ANDERSON, THE ASSOCIATED PRESS, THE CAPITAL TIMES, and MILWAUKEE JOURNAL SENTINEL,

Plaintiffs-Respondents,

v.

EDWARD A. BLAZEL, in his official capacity as Assembly Chief Clerk and WISCONSIN STATE ASSEMBLY

Respondent-Appellant.

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# BRIEF OF WISCONSIN STATE JOURNAL, JONATHAN ANDERSON, THE ASSOCIATED PRESS, THE CAPITAL TIMES, AND MILWAUKEE JOURNAL SENTINEL

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On Appeal from the Circuit Court for Dane County
Case No. 2020CV764
The Honorable Juan B. Colas Presiding

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## STATEMENT OF THE ISSUES

1. Did the Assembly violate Wisconsin's Open Records law, Wis. Stat. §§19.31, *et seq.*, by initially denying the Newspapers' requests for records of an investigation into a former representative's alleged sexual harassment of a female staffer?

Circuit Court Answer: Yes

2. Did the Assembly violate Wisconsin's Open Records law by redacting certain information out of the records it produced to the Newspapers eight months after the original requests?

Circuit Court Answer: Yes

3. Are the Newspapers entitled to attorney fees, costs, and statutory damages under Wis. Stat. §19.37(2) on both of their causes of action?

Circuit Court Answer: Yes

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Newspapers do not believe oral argument would be useful in this case. Briefing should be sufficient to fully present the parties' arguments, and this Court has substantial experience applying the Open Records law to records of internal investigations.

The Newspapers agree with the Assembly that this case meets the criteria for publication under Wis. Stat. §(Rule) 809.23(1)(a). The State Legislature's policy of never releasing records of internal investigations is of substantial and continuing public interest, *id.* §809.23(1)(a)5., and the application of the balancing test to the legislature's internal investigation records is significantly different than the applications of the balancing test in previous published opinions, *id.* §809.23(1)(a)2.

## SUPPLEMENTAL STATEMENT OF THE CASE

### *Nature of the Case*

This is a case to enforce the Open Records law, Wis. Stat. §19.31 *et seq*. In response to reports of serious misconduct by a state legislator, Plaintiffs-Respondents Wisconsin State Journal *et al.* ("the Newspapers") sought records of the allegations and investigation. Rather than providing the records, the Wisconsin Assembly and its chief clerk (collectively, "the Assembly") denied the requests and instead provided a sanitized summary of information they deemed disclosable. The circuit court rejected that approach, but the Assembly now presses it before this Court, based largely on unsubstantiated statements of unnamed Assembly staff and strained interpretations of the Open Records law. The Court should reject the Assembly's appeal and affirm the circuit court.

### *Statement of Facts*

#### The Harassment Complaint

The Assembly's Harassment, Discrimination, Retaliation, Violence & Bullying Policy ("Assembly Policy") allows persons alleging violations of work rules to proceed with complaints either informally or formally. An informal complaint can be made verbally. (R.60:11-12.) A formal complaint is made in writing. (App.079, R.56:28.) Regardless of which route is taken, confidentiality is not guaranteed and employees are made aware that the information may be made public. (R.60:11-13.)

After initially proceeding with an informal complaint, the Victim in this case changed her mind and filed a formal complaint against then-Representative Staush Gruszynski with the Legislative Human Resources Office ("LHRO") on November 26, 2019. (App.062, R.46:11.)

The Victim's complaint (App.034, R.38:32) alleged that on October 30, 2019, she, Gruszynski, and other legislators and staffers "went out after work

to enjoy some cocktails and food." Members of the group visited several locations, including a Planned Parenthood event and the Rigby Bar, at which "many other Representatives, Senators and staffers" from the Capitol were present. Gruszynski "had had several drinks" and "had drank a lot" while they were out. The Victim left the group for a while with plans to meet up with friends later, and during that time exchanged Facebook messages with Gruszynski. (*See also* App.040-048, R.38:38-46.) The Victim described Gruszynski as being "very drunk" and confused about where he was. The Victim invited Gruszynski to meet her and her friends at the Malt House.

The Victim described how Gruszynski sexually propositioned her:

> We sat down next to him at the bar. After a few minutes he told me that he had his eye on me for years. I asked what he meant. He said oh you know what I mean, I've wanted you for years and I know you felt the same way, I know it now. He asked if he misread my signals. I asked what signals he was talking about. I told him that he was married and [redacted] but even if that was not the case he is a representive (sic) and I was a staffer and that it was highly inappropriate. He kept saying 'oh come on" and "did I misread your signals" over and over again. He said "no one has to know" "it can be quick" and "I can just follow you home you know?" He said "I thought you wanted this, I want you". I said no, not at all, you must be joking. He then asked if I really didn't want to hook up with him, then why did I ask him out? I said because I thought we were friends and I was worried about you being drunk and not knowing where you were and that he needed to sober up. He proceeded to repeat over and over "oh come on, did I really misread signals, I don't think so, I think you want it same as me.'

(App.034, R.38-32.)

As the Victim and her friends left, they told the bartender to call Gruszynski a cab. After she left, Gruszynski tried to call the Victim and sent her a Facebook message saying "I'm heading back to the Hyatt. I apologize For the general reaction. I appreciate you getting me home." (App.048, R.38-46.)

Four witnesses' and Gruszynski's statements are related in the LHRO's investigative report:

- The first witness interviewed by the LHRO, who was not at the Malt House, said that earlier in the evening, Gruszynski had already been drunk and had "admitted to having had too much to drink." After the Victim told him what had happened at the Malt House, he confronted Gruszynski, who claimed to have no recollection of the previous night's events and said he wanted to apologize to the Victim.
- The second and third witnesses were both at the Malt House, witnessed Gruszynski's harassment, and corroborated the Victim's claims. The third witness described Gruszynski as "completely inebriated." The third witness also re-entered the Malt House after their group had left and confronted Gruszynski, who "dismissed/ gaslighted" her.
- The fourth witness, the Victim's employer, related how the Victim called her from the Malt House bathroom and told her that Gruszynski was drunk and made multiple sexual advances. The Victim also told her that Gruszynski told her she had been sending the wrong signals and that it was her fault for leading him on. The next morning, she texted Gruszynski that they needed to talk, but Gruszynski claimed not to know what she wanted to talk about or why she would be upset. She also described how, prior to this incident, she had noticed Gruszynski had been drinking more frequently and in larger quantity, which had worried her because she believed he had a drinking problem.

(App.035-039, R.38:33-37.)

Gruszynski told interviewers he spent the night of October 30th drinking large amounts at different bars. He said he could not remember what happened that night after drinking at the Rigby because he was "so drunk that he 'blacked out.'" He tried to piece together the night's events with his bar

receipts, his Uber history, and Facebook messages. He acknowledged that he had been drinking a lot more over the prior months but had not drunk since the night of October 30th. Gruszynski told interviewers [redacted]. (App.037-38, R.38:35-36.) Neither the Victim's complaint nor LHRO's report was shared with Gruszynski. (R.47:14-16.)

Prior to releasing any public information about the Victim's complaint, the LHRO consulted with Rep. Gordon Hintz (Gruszynski's legislative leader), Hintz's chief of staff, and the Victim about what information to release to the public. (App.064-065, R.46:13-14; R.47:16-17.) Before seeing any record requests, Amanda Jorgenson, then-Human Resources Manager for the LHRO, prepared the "High-Level Summary for S.G. Complaint" ("Summary") to release in response to record requests. (App.065-066, R.46:14-15; R.47:17.)

On the same day that Assembly Democratic leadership released a statement about the incident, Gruszynski released a public statement admitting he "made inappropriate comments to a female staffer," that he had drunk too much, and that his "conduct was unprofessional and completely unacceptable." He apologized and stated that he had "sought out counseling for myself and my family" and was "actively working on my continued sobriety." (R.47:58-59.)

**The Open Records requests**

On December 19 and 20, 2019, the Newspapers each made requests for records related to the complaint against Gruszynski ("the Disputed Records"). (App.013-018, R.38:11-38:16.)

Three other individuals made requests similar to those made by the Newspapers: Victor Jacobo, capitol reporter for CBS 58 (R.60:36), J.R. Ross, from WisPolitics (*id.* at 32-33), and Amanda St. Hilaire, investigative reporter for WITI-TV FOX6 News (*id*. at 34; R.62:1-2).

The Assembly provided the same response to each requester: a copy of the Summary and no records. (App.018, 066, R.38:16; R.46:15; R.60:32, 34-37.) The Summary described Gruszynski's behavior in few words: "Gruszynski verbally sexually harassed the employee, while at an offsite location/after work hours." (App.018, R.38:16.)

Prior to the requests, and in response to a request for records related to a 2018 investigation into a different legislator, Chief Clerk of the Senate Jeffrey Renk stated that "it is the Legislature's policy not to release any details of investigations into lawmakers, only summaries." (R.60:15; 62:11.) When pressed for details about the policy, Renk claimed that it was not a "formalized policy," but rather a practice. (*Id.* at 5-6.) Renk wrote that this "practice" of only providing summaries was developed through discussions with the majority and minority leadership offices in both the Senate and Assembly. (*Id.* at 6.) Then-Chief Clerk of the Assembly, Patrick Fuller, provided an identical response that the practice was the same for both the Senate and Assembly. (*Id.* at 12.)

In the past five years, the Assembly has not released any underlying records in response to open records requests for investigations, releasing only summaries similar to the Summary released in this case or letters setting forth punishments. (R.47:24-25; R.60:16-21, 23-31.) Legislative leadership has repeatedly justified refusals to produce underlying documents under the balancing test using explanations that were nearly verbatim copies of the response provided in this case. (*Compare* App.018, R.38:16 *with* R.60:14, 24-25.) Other responses were less verbatim but still related substantively the same arguments. (*See, e.g.*, R.60:16, 29-30.) Jorgenson consulted a file containing sample language for responses and examples of prior responses to record requests when drafting the Summary. (R.47:20-22.)

***Procedural History***

After receiving the Assembly's denial of their Open Records requests in December 2019, the Newspapers filed this suit in March 2020.

In August 2020, *The Capital Times* published an article based on interviews with the Victim. (App.019-33, R.38:17-31.) The article was published four days before the Fall Partisan Primary election in which Gruszynski faced a challenger. (R.60:38-40.) Much of the campaigning in that primary focused directly on Gruszynski's sexual harassment of the Victim. (*E.g.*, R.60:41-49.) The Victim cited the primary, the need to defend her work history at the Capitol, and "an urge to set the record straight" as reasons for coming forward. (App.031, R.38:29.)

After the article, the Assembly produced redacted copies of the Disputed Records to the Newspapers, without prompting. (App.019-33, 049-051, R.38:17-31, 47-49.) The Assembly did not provide unprompted redacted copies of the Disputed Records to the three others who had made requests in December 2019: St. Hilaire, Ross, or Jacobo. (R.60:4; 62:2.) Only Ross, who made a new request for the records, was provided with copies. (R.74:1-6.) The Assembly has since produced no evidence that anyone has been identified due to the release of the redacted Disputed Records. (R.60:4.)

The Newspapers revised their complaint to challenge both the initial denial as well as some August 2020 redactions. (App.003-51, R.38.) The Newspapers and the Assembly filed cross-motions for summary judgment. (R.41, R.61.)

The circuit court granted Newspapers' motion and denied the Assembly's in a written decision. After reciting the facts and law, it found the Summary did not provide "any of the records requested and must be treated as an outright denial of the requested records." (App.088, R.89:5.) It further found this "initial refusal to release any records and the eight-month delay in releasing redacted records are violations of the Open Records Law," due in

large part to the Assembly's failure to consider the strong interests in disclosure. (App.089, R.89:6.) It also found the redactions were excessive in the two respects identified by the Newspapers, and that the Newspapers were entitled to their attorney fees and costs because the initial denial was improper or, alternatively, because the lawsuit was a cause of the records' release. (App.089-091, R. 89:6-8.) This appeal followed.

## STANDARD OF REVIEW

The first sentences of the Open Records law declare the state's official policy of virtually unfettered access to government information:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

Wis. Stat. §19.31. "This statement of public policy in §19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240.

The presumption in favor of access creates rules for this Court's interpretation of the law. Sections "19.32 to 19.37 shall be construed in every instance with a ***presumption of complete public access***, consistent with the conduct of governmental business," and "***only in an exceptional case may access be denied***." Wis. Stat. §19.31 (emphasis added). The application the Open Records law to undisputed facts presents a question of law that appellate courts review *de novo*. *Zellner*, 300 Wis. 2d 290, ¶17.

"Normally, whether a party has made the requisite showing under sec. 19.37(2) [that a lawsuit was at least a cause of the release of records] is a factual determination that is within the province of the trial court" and "will

not be overturned unless [it is] clearly erroneous." *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 160, 499 N.W.2d 918, 920 (Ct. App. 1993) (citing *Racine Educ. Ass'n v. Bd. of Educ.*, 145 Wis. 2d 518, 522, 427 N.W.2d 414, 416 (Ct. App. 1988)). If a finding of causation is based on an inference drawn from undisputed or established facts, the court of appeals instead applies the reasonableness standard. *Id.* at 160-61.

Appellate courts "review a grant or denial of summary judgment independently, applying the same standards employed by the [lower courts], while benefitting from their discussions." *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶16, 379 Wis. 2d 471, 907 N.W.2d 68. "Summary judgment is appropriate only when there is no genuine dispute of material fact and the moving party has established his or her right to judgment as a matter of law." *Id.*; *see also* Wis. Stat. §802.08(3) (providing summary judgment affidavits "shall set forth such evidentiary facts as would be admissible in evidence").

## ARGUMENT

The Open Records law establishes the public's access to records, but the Assembly denied the Newspapers' requests for records related to serious allegations of legislator misconduct, instead producing their own "Summary" of the records that contained the information they chose to share. This was not the first time legislative leaders chose to release information in drips and drabs—recent history confirms they respond with similar summaries to other requests for records of misconduct. This Court should uphold the circuit court's findings that (1) the Assembly's initial denial of the Disputed Records was improper, (2) the Assembly's redactions when they did eventually release the records were excessive, and (3) the Newspapers are entitled to their costs and fees of litigation under Wis. Stat. §19.37(2).

## I. The Assembly Improperly Denied the Newspapers' Open Records Requests.

The circuit court correctly found that under the balancing test, the Disputed Records—at least in redacted form—should have been released when they were initially requested in December 2019 and not entirely withheld.

### A. *The public interest balancing test*

The Assembly denied the Newspapers' requests not based on any statutory exception to disclosure, but based on the "balancing test." Under this test, the Assembly must show that "allowing inspection would result in harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing inspection." *Hagen v. Bd. of Regents of Univ. of Wis. Sys.*, 2018 WI App 43, ¶7, 383 Wis. 2d 567, 916 N.W.2d 198. A court may not "hypothesize or consider reasons to deny the request that were not asserted by the custodian." *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158. "If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." *Id.* (citing *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985)).

The Assembly distorts the balancing test, arguing that custodians and courts should not consider "various interests that might be served by disclosure" and instead should only consider "whether the authority's reasons for ***non***disclosure are sufficient to outweigh the public interest favoring disclosure ***that is already established by the [Open] Records law***." (Assembly Br. 34, emphasis added (citing *Madison Teachers, Inc. v. Scott*, 2018 WI 11, ¶16, 379 Wis. 2d 439, 906 N.W.2d 436; *Democratic Party of Wis. v. DOJ*, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584)). That claim misstates the Assembly's cited sources and contradicts the law.

In fact, custodians and courts are required to "consider[] ***all relevant factors*** to determine whether the public interest in nondisclosure outweighs the public interest in favor of disclosure." *Democratic Party of Wis. v. DOJ*, 2016 WI 100, ¶11, 372 Wis. 2d 460, 888 N.W.2d 584 (hereinafter "*DPW*"). The "general presumption of openness" provides a strong default in favor of disclosure, but is hardly the only pro-disclosure factor to be considered. *Id.* ¶10. As described *infra*, courts have already explicitly recognized many other such factors, such as the public's interest in the performance of public officials and employees. *See* Section I.B.

The Assembly also decontextualizes the "substantial discretion" a custodian has in performing its own balancing test. (Assembly Br. 24, citing *DPW*, 372 Wis. 2d 460, ¶¶10-11.) The "discretion" in that case—and in *Hempel v. City of Baraboo*, which first used the phrase—refers to the fact that a custodian must perform the test in the first instance without "blanket exceptions or bright line rules," and thus must perform the test on a case-by-case basis. *DPW*, 372 Wis. 2d 460, ¶¶9-10; *Hempel*, 2005 WI 120, ¶62, 284 Wis. 2d 162, 699 N.W.2d 551. That does not change the fact that records may only be withheld in an "exceptional case," with a "strong presumption favoring disclosure." *DPW*, 372 Wis. 2d 460, ¶9.

More importantly, custodians are not entitled to ***any*** deference from this Court, which performs its own balancing test *de novo* benefiting only from the analysis of the court below. *Id.* ¶9; *Hempel*, 284 Wis. 2d 162, ¶21; *see also John K. MacIver Inst. for Pub. Pol'y, Inc. v. Erpenbach*, 2014 WI App 49, ¶15, 354 Wis. 2d 61, 848 N.W.2d 862 ("We will not take it upon ourselves to create a rule treating legislators differently from other elected or nonelected records custodians.").

B. *Strong public interests favor disclosure of the Disputed Records—not the Summary*.

1. Strong public interests support disclosure of the Disputed Records.

In addition to the default presumption in favor of access, Wis. Stat. §19.31, strong public interests support disclosure of the Disputed Records, as the circuit court found. (App.089, R.89:6.)

First among these interests is the fact that the records concerned an elected official and his conduct. "'The public has a very strong interest in being informed about public officials who have been derelict in their duty'." *DPW*, 372 Wis. 2d 460, ¶22 (quoting *Hempel*, 284 Wis. 2d 162, ¶68). Wisconsin courts have long recognized that allegations of wrongdoing by public servants are a matter of public importance that outweighs concerns for the servant's reputation or interest in avoiding embarrassment. *E.g., Zellner*, 300 Wis. 2d 290 (applying balancing test and ordering disclosure of records of pornographic websites accessed by teacher on government computer); *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811 (applying balancing test and granting requester access to police report documenting accusations that teacher made inappropriate sexual remarks to students); *Kroeplin v. DNR*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286 (rejecting custodian's rationales against disclosure of warden's disciplinary records).

Gruszynski was not merely any public servant, but one of the highest public officials in the state. And, as an elected member of the state Legislature, Gruszynski's conduct was a matter of heightened public interest: the voters of his district were in charge of the ultimate personnel decisions over him and were entitled to know about his actions. The Victim herself seemed to recognize this fact when she shared her story with *The Capital Times* just prior

to Gruszynski's August 11, 2020, primary election, which he subsequently lost. (App.019-033, R.38:17-31; 60:38-40.)

Furthermore, Wisconsin courts have long recognized "the great importance of disclosing disciplinary records of public employees and officials where the conduct involves violations of . . . significant work rules." *Kroeplin*, 297 Wis. 2d 254, ¶28. Here, Gruszynski's conduct strongly implicates that interest. Sexual harassment constitutes serious misconduct that is explicitly prohibited by the Assembly Policy Manual. (R.60:8.) Further, Rep. Gruszynski did not harass a random citizen; his victim was a subordinate employee of the Assembly. In light of these factors, the "very strong" public interests in the disclosure of records of public official misconduct are at near-apex levels here.

Additional public interests in how that underlying conduct was handled also serve to compel disclosure: "the public has a strong interest in monitoring the disciplinary operations of a public institution." *Hagen*, 383 Wis. 2d 567, ¶9 (citing *Linzmeyer*, 254 Wis. 2d 306, ¶28, *Zellner*, 300 Wis. 2d 290, ¶53). The Newspapers' requests were not simply for descriptions of what occurred. They sought documentation of how the LHRO investigated and resolved the complaint. As the circuit court found, such records fit squarely into the public's "strong interest" in monitoring the LHRO's disciplinary procedures—to provide assurance to the public that such matters are correctly investigated, to legislative employees that they may rely on these procedures in the future, and even to elected officials that they may be apprised of the bounds of acceptable conduct. (App.089, R.89-6.)

The interests in this case are "at the core of the public's right to information about how its government is operating" (App.089, R.89-6) and the Disputed Records should have been released when initially requested.

2. The pro-disclosure interests were not satisfied by the Assembly's "High-Level Summary" or other actions.

The Assembly attempts to brush aside the strong public interests compelling disclosure by stating that "many" such interests were satisfied by their release of the Summary, Assembly Democrats' press statements and, incredibly, media reports about the incident. (Assembly Br. 32-34.)

First, nothing within the text of the Open Records law allows a custodian to substitute a summary of information in records for actual records. *See* Wis. Stat. §§19.31-.37; *Journal Times v. Police & Fire Commissioners Bd.*, 2015 WI 56, ¶55, 362 Wis. 2d 577, 866 N.W.2d 563 (noting the Open Records law permits access to records, not information). As the circuit court found, the Summary did not provide the records and could only be construed as a denial. (App.088, R.89:5.)

Second, the Summary omitted significant information about Gruszynski's conduct that was contained in the records, including about:

- Gruszynski pressuring the Victim for sex.
- Gruszynski blaming the Victim for misleading him.
- Gruszynski's marital status.
- Gruszynski's drunken condition that night or his larger drinking problem.
- Gruszynski [redacted].
- Gruszynski's claim that he could not recall the events of that night.
- Gruszynski crying, expressing remorse, and wanting to apologize, his failure to challenge any of the allegations made against him, and his acknowledgment of responsibility for what happened.
- How the complaint was investigated.
- How the witnesses' statements corroborated the Victim's allegations.
- Whether Gruszynski was shown a copy of the Victim's complaint or LHRO's report.

(*Compare* App.018, R.38-16 *with* App.034-048, R.38:32-38:46.) These are significant omissions about serious allegations—allegations the public had a strong interest in understanding.

Third, it would be a damaging precedent to allow records custodians to summarize important investigations however they see fit. That would invite a

custodian-investigator to provide distorted and rosy images of its handling of the matter. Even more suspect would be allowing a custodian to rely, as the Assembly does here, on "call[s] to resign" and intra-caucus "remedial actions" imposed not by the records custodian, but by a separate actor—the Assembly Democratic Leadership. (Assembly Br. 33-34.) That actor, of course, has its own compromising motivations, including reason to distance itself from a political liability and insulate itself from public accountability over embarrassing facts. And citing "media reports" as a stand-in for the records (*id.*, 35-36) ignores that the media relies on records for reporting; the fact that the Newspapers have sued here shows the information the Assembly chose to release was ***not*** sufficient.

The Assembly suggests their treatment of the Newspapers' requests "was no attempt to cover up official misconduct," thus rendering involved privacy interests "more compelling." (Assembly Br. 34 (citing *Hempel*, 284 Wis. 2d at 200).) But the *Hempel* court was referring to the fact that the record request at issue there was made ***by*** the alleged wrongdoer, so the custodian's resistance to the request was not an attempt to cover up information on his behalf. 284 Wis. 2d 162, ¶¶10, 78. Further, the *Hempel* court was not concerned with whether the custodian was covering up the fact that misconduct occurred, but whether it was covering up "evidence." *Id.* ¶78. Regardless of intent, the Assembly plainly ***did*** cover up ***evidence*** of Gruszynski's actions and the associated investigation, beyond the barest of generalities. The Summary's single-sentence description of the conduct at issue could have referred to something as comparatively innocuous as an inappropriate joke told within the Victim's earshot.

Satisfying the public interest in evaluating the conduct and investigation requires much more than the binary fact of whether or not Gruszynski violated a policy and faced consequences as a result. Instead, the Open

Records Law allows members the public to see the truth and make their ***own*** judgments about their elected leaders and the sufficiency of investigations—not to filter information through those leaders, their colleagues, or their subordinate human resource employees. Even in *Hempel*, the custodian released records to the plaintiff "provid[ing] substantial information with which [one] could pursue an inquiry on sexual harassment within the police department," replete with details of the alleged conduct. 284 Wis. 2d 162, ¶69.

The Assembly's Summary does not compare.

C. *The Assembly did not cite sufficient reasons to overcome the strong public interests favoring disclosure*.

In order to justify withholding the Disputed Records, the Assembly must show that this was an "'exceptional case' [wherein] the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, ***notwithstanding*** the strong presumption favoring disclosure." *Hempel*, 284 Wis. 2d 162, ¶63 (emphasis in original) (quoting Wis. Stat. §19.31). The Assembly's arguments for nondisclosure all essentially boil down to a vague confidentiality concern. This is not the "exceptional case" where the complete failure to provide records is lawful.

1. Confidentiality and "chilling effect" interests do not support the withholding here**.**

The Assembly argues that its denial was justified by concerns about complainant or witness confidentiality (Assembly Br. 26, 31), relying exclusively on *Hempel*.

### a. Redaction would have addressed the Assembly's concerns.

*Hempel* supports neither the weight that the Assembly places on confidentiality, nor its arguments generally. First, that case does not purport to make such concerns decisive; rather, it describes them as "***a factor*** the custodian may consider in the balancing test." 284 Wis. 2d 162, ¶71 (emphasis added).[1]

Moreover, the specific fear that the custodian and the court were concerned with in *Hempel* was that victims' and witnesses' ***names*** would be directly disclosed; the concerns did not extend to other record information. *Id.* ¶¶69-73. Unlike the Assembly here, the *Hempel* custodian released a redacted copy of the complaint to the public. *Id.* ¶69. The court found that the redaction "protected the privacy and confidentiality of certain witnesses without hiding alleged conduct," and that the "release of the redacted documents weighs heavily in the balancing test." *Id.* ¶70.

Here, the Assembly's Summary ***did*** hide the conduct, and the Newspapers have never contended that the Assembly should have released the names of the victim or interviewed witnesses. As the circuit court found after reviewing the unredacted records *in camera*, the Assembly could have addressed their concerns by simply redacting the affected names (App.089, R.89:6), as they did when they ultimately released records in August 2020. Therefore, *Hempel* does not support the Assembly's initial denial here.

Ignoring this problem, the Assembly contended in the Summary and in the circuit court that even a redacted release would compromise

[1]The Assembly also cites the court of appeals' decisions in *Hempel* and *Journal-Times v. City of Racine Board of Police & Fire Commissioners*. (Assembly Br. 27, 35.) However, the Wisconsin Supreme Court has not decided whether a court of appeals decision has precedential value after it has been reviewed by the Wisconsin Supreme Court. *See State v. Gary M.B.*, 2004 WI 33, ¶44 & n.1, 270 Wis. 2d 62, 676 N.W.2d 475 (Abrahamson, C.J., dissenting). The Newspapers rely on the supreme court versions of these cases.

confidentiality interests. (*See* R.38:16, App.018; R.45:27-31; R.77:7-8.) Yet the Assembly had ample opportunity to provide actual evidence of the risk that releasing redacted records would lead to identification of the Victim or witnesses here—particularly given that the August 2020 release was a direct test of that risk. Their inability to provide any is independently fatal to their case.

**b. The Assembly's "chilling effect" arguments do not support nondisclosure**.

Perhaps attempting to evade this failure, the Assembly makes a remarkable change of tack, conceding that it is "not arguing that the Disputed Records could not have been redacted in such a way as to protect the identities of the Victim and the witnesses." (Assembly Br. 32.) Instead, citing *Hempel*, they now argue that "the relevant question is whether the release . . . would have had a negative impact or chilling effect" on future LHRO misconduct investigations based on reported complainant or witness perceptions of the risk of identification—perceptions completely divorced from the actual risk. (*Id.*)[2] In other words, the Assembly argues that custodians can rely on unsubstantiated and even irrational fears as justifications for withholding records. However, the Assembly cannot show a reasonable likelihood that harm would actually have been produced by the requested release here, and case law disallows denials based in such speculative concerns. *E.g., MacIver*, 354 Wis. 2d 61 ¶¶23, 26.

Like its discussion about confidentiality generally, the *Hempel* court's brief contemplation of chilling effects was premised on the actual disclosure of the identities of complainants and witnesses. *See Hempel*, 284 Wis. 2d 162, ¶¶72-73 (describing such concerns as relevant "if [those individuals] know that

[2]The Assembly complains that this concern was "not even considered by the circuit court." (Assembly Br. 27.) That is untrue. (*See* R.89:5-6, App.088-89.)

their names and comments will become public record"—in other words, "if their names were revealed"). Thus, the Assembly's argument is unsupported by *Hempel* because it is not grounded in the actual risk of direct identification. As this Court has recently held, redacting the "identities of the complainant and witnesses . . . reinforces the conclusion that there likely would be ***no chilling effect*** on future potential complainants [or] witnesses." *Hagen*, 383 Wis. 2d 567, ¶9, n.5 (emphasis added).

The Assembly's argument is also directly contrary to this Court's precedent in *MacIver*, which holds that significant weight can be given to such confidentiality or "chilling effect" concerns ***only*** if the record includes "instances of actual threats, harassment or reprisals against" those who fear identification. 354 Wis. 2d 61, ¶¶22-26. That court rejected the exact same kind of evidence proffered by the Assembly here—an affidavit from the custodian averring that *other* people had expressed concern about negative repercussions of public identification. *Id*. ¶23. On top of that, the statements of unnamed legislative employees cited in the Jorgenson affidavit are inadmissible hearsay since they are submitted for their truth—and if they are not, they are irrelevant. Wis. Stat. §908.02.

Perhaps even more importantly, any chilling effect on victim and witness cooperation would be more likely to result from a ***failure*** to disclose. Indeed, the Assembly's initial refusal to release any records about LHRO's investigation into Gruszynski's conduct lent itself to natural questions about whether LHRO was hiding information to protect its legislator bosses or avoid its own investigation from being revealed to be insufficiently protective of victims or the public interest. By contrast, the release of such investigative records "favor[s] accountability." *Hagen*, 383 Wis. 2d 567, ¶9. Therefore, as the circuit court understood, victim and witness comfort in bringing forward concerns may be enhanced, not damaged, by the assurance that LHRO is

incentivized to maintain high standards for its internal investigative practices because those practices have a modicum of transparency and accountability. (R.89:6, App.089.)

At any rate, legislative employees who file complaints are given an informed choice to do so either informally or formally, and are made aware that confidentiality is not guaranteed and the information may be required to become public. Therefore, employees have no reasonable expectation of complete privacy if they do file a complaint. (R.60:9-13.) If they do, they do so knowing the potential for public disclosure of records, with policies in place to protect them from retaliation if disclosure does occur. (*Id.*)

The Court should reject the unsubstantiated "chilling effect" argument.

**c. The Assembly's "chilling effect" arguments are really an impermissible blanket exception to disclosure**.

The Assembly's Summary was not an aberration, but was consistent with the Legislature's practice of ***never*** providing the underlying complaints or investigative records of internal investigations into legislator misbehavior.

The Assembly's "chilling effect" argument relies on facts that are not specific to this case. It cites statements of concern by unnamed legislative employees over the past four years, the Capitol's unique culture "where people are required to constantly be 'in the know'," and the opinions of Ms. Jorgenson, an employee and fact witness that the Legislature seeks to elevate to an expert on appeal. (*E.g.*, App.059-061, R.56:8-11.) If these rationales are present here, they are present in ***any*** employee investigation. Yet a custodian "cannot implement a policy that provides for a blanket exception from the Open Records Law." *Hempel*, 284 Wis. 2d 162, ¶71.

The Assembly now backpedals, claiming it does not seek a blanket exception from the law but instead must consider the chilling effect the release of records may create as part of the balancing test. (Assembly Br. 33.) But its

actions indicate otherwise. As shown above, *see* Facts, *supra*, the Legislature has a policy or practice, developed in consultation with leadership, of not releasing any details of lawmaker investigations—only summaries. (R.62:1-2, 5-8, 9-11.) This policy or practice has been repeated in responses to open records requests over the past five years, with the Legislature used substantively identical summaries and explanations that are nearly verbatim copies of the response provided in this case. (*Compare* App.018, R.38:16 *with* R.60:14, 24-25; *see also* R.47:20-22.) The Assembly's actions in this case were consistent with its policy and practice rather than the individual application of the balancing test.

The Assembly may argue that no blanket policy exists because they produced redacted records here "when circumstances changed and the Victim in this case came forward and told her story publicly." (*See* R.73:17.) The Newspapers disagree with the Assembly's theory of causation, *see* Section III, *infra*, but at most this only shows a contour to the Assembly's policy—that investigative records of legislative misconduct will stay sealed, except when the victim permits release. There is no limiting principle for such acquiescence to a victim's whims, which—as this case shows—may change.

Notably, the Legislature attempted to broadly exempt records of legislative misconduct investigations in a bill the Governor vetoed this summer. 2021 Assembly Bill 407, §6; Governor's Veto Message, A.J. at 397 (July 8, 2021).[3] The Assembly should not be able to achieve the same result through the courts.

2. No "dignity interest" supports the withholding.

The Assembly next posits a separate "dignity interest" for people involved in the investigation. (Assembly Br. 28-30.) Not only does this argument rely on the same confidentiality concerns rejected above, but it

[3] *Available at* https://docs.legis.wisconsin.gov/2021/related/veto_messages/ab407.pdf.

comes dangerously close to replacing ***individual*** interests in confidentiality above the ***public***'s.

The Assembly relies solely on *DPW* for its argument regarding "dignity interests." (Assembly Br. 29-30.) However, that case mentioned "dignity" only because the records there concerned crime victims, and statutes and the constitution provide that such victims should be treated with dignity. 372 Wis. 2d 460, ¶¶14, 29. No case recognizes a "dignity interest" related to public official misconduct investigations.

Regardless, *DPW* does not support any of the Assembly's arguments. First, the identity-revealing factors that would have allowed the public in that case to "easily connect the dots to identify the dozens" of minor victims, 372 Wis. 2d 460, ¶29, are not present here. For that matter, the records here concern one adult victim of sexual harassment in the workplace, not dozens of minor victims of sexual assault in a criminal case. *Id*. (providing "[such] child victims . . . deserve special treatment and protection with an emphasis on keeping their identities confidential"). In addition, the perpetrator in *DPW* was an otherwise anonymous high school student, not a member of the State Legislature for whom, as described above, the law recognizes a strong public interest in records access. *Id.*, ¶25. All parties to the case also agreed that the record at issue did ***not*** contain any evidence of any dereliction of duty or misconduct. *Id*. ¶22. These are not the facts here.

Both cases relied on by the Assembly are also inapposite here because they are rooted in law enforcement interests. *Hempel* explicitly draws on a line of cases specific to the files of ***police officers*** and their special law enforcement and investigative functions in society. 284 Wis. 2d 162, ¶61 (citing *Pangman v. Zellmer*, 163 Wis. 2d 1070, 473 N.W.2d 538 (Ct. App. 1991), *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991)). Similarly, *DPW* roots its analysis largely in interests particular only to ***law enforcement***

investigations, particularly "the strong public interest in investigating and prosecuting criminal activity." *DPW*, 372 Wis. 2d 460, ¶13. The investigation at issue in this case was by a human resources office, not by a law enforcement agency. As such, although there may remain some interest in protecting sensitive personnel information, the stakes are accordingly lower and the interests less compelling.

Finally, the Assembly attempts to expand the notion of "dignity interest" to include concern for the Victim's mental state (Assembly Br. 29), but this argument was not asserted in the Summary and cannot be raised now. *Journal Times*, 362 Wis. 2d 577, ¶64 (confirming new bases for non-disclosure may not be asserted in balancing test cases). To the extent the Assembly relied on the Victim's initial "wishes" or self-assessment that the records would reveal her identity (Assembly Br. 26, 28), this case demonstrates the unworkable position both custodians and record requesters face if a third party is allowed control over whether records are released. Only the ***public's*** interest in non-disclosure can trump the public's interest in disclosure, *Linzmeyer*, 254 Wis. 2d 306, ¶31, but the Assembly would impermissibly elevate the individual's interest in non-disclosure in the balancing test.[4]

Therefore, the interests that the Assembly relies on cannot overcome the strong interests favoring disclosure.

D. *The Assembly's speculative mootness concerns are an irrelevant distraction.*

The Assembly's final argument regarding the initial denial is that it ***might*** be rendered moot if a binding precedent of this Court is overturned in a

[4] Case law has recognized when a promise of confidentiality can limit access during an investigation, *see Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 168, 469 N.W.2d 638 (1991), but the Assembly makes no attempt to show these factors are satisfied.

case currently before the Supreme Court. (Assembly Br. 34-37.) Regardless of what occurs in that case, the denial here should be reviewed.

The Assembly raises mootness as a prospective defense based on the "possibility that the Supreme Court could reverse or modify the holding of *Friends of Frame Park*." (Assembly Br. 36.) That case held that "where litigation is pending and an authority releases a public record because a public records exception is no longer applicable . . . the key consideration [in determining whether the requesting party has 'substantially prevailed'] is whether the authority properly invoked the exception in its initial decision to withhold release." *Friends of Frame Park, U.A. v. City of Waukesha*, 2020 WI App 61, ¶4, 394 Wis. 2d 387, 950 N.W.2d 831. In other words, the Assembly suggests that if *Friends of Frame Park* is overruled, there is no need for the Court to evaluate the propriety of the initial denial, and this Court could "vacate the circuit court's decision on that issue, and remand with instructions to enter judgment for the Assembly." (Assembly Br. 36-37.)

The Court should reject the Assembly's suggestion. First, there is no reason to believe that the Supreme Court ***will*** overturn the precedent here, which simply "follows from the language of [Wis. Stat. §19.35(4)(a)]." *Friends of Frame Park*, 399 Wis. 2d 18, ¶4. Second, even if that decision is ultimately overturned, it would be relevant here only as to the threshold for a fee award, and the Court should still determine whether the circuit court correctly granted summary judgment to the Newspapers on the initial denial.

There are several established exceptions under which a court may address moot issues, including where: (1) "the issues are of great public importance"; (2) "the issue is likely to arise again and should be resolved by the court to avoid uncertainty"; or (3) "the issue is capable and likely of repetition and yet evades review." *In re J.W.K.*, 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509 (internal citation omitted).

These exceptions are all met here. As the Newspapers have demonstrated, this case concerns several matters that are indisputably of great public importance, including the right of the public to know about the behavior of their elected representatives and about the efforts of the Legislature to protect employees from predatory behavior by coworkers. Further, particularly in light of the Assembly's repeated denials for records of legislator misconduct, such issues are likely to arise again and yet evade review – if, as here, the custodian attempts to avoid a merits ruling by turning over records. As a result, a ruling on the circuit court's merits determination would still be warranted even if the Supreme Court were to overturn *Friends of Frame Park*.

Finally, as the circuit court correctly noted, the Newspapers would still be entitled to attorneys' fees and costs based on the traditional causation test even if *Friends of Frame Park* were to be overturned. (R.89:8, App.091; *see also* Section III, *infra*.) There is therefore no reason under any eventuality for this Court to vacate the circuit court's decision.

## II. The Assembly Violated the Open Records Law by Redacting Certain Information from the Records it Later Produced.

Once the Assembly did release the Disputed Records in August 2020, they applied excessive redactions to them. The Newspapers challenge two categories of redactions: (1) the names of a legislator and a staffer who were neither the Victim nor witnesses; and (2) medical information Gruszynski provided during the LHRO's investigation. The Court should affirm the circuit court's ruling that those redactions were unlawful.

### A. *Custodians have an obligation to separate and provide disclosable information.*

"If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is

subject to disclosure and delete the information that is not subject to disclosure from the record before release." Wis. Stat. §19.36(6). "[This] statute requires the custodian to provide the information subject to disclosure and delete or redact the information that is not." *Osborn*, 254 Wis. 2d 266, ¶45. When an authority releases a redacted document, it has withheld part of a document, allowing a requester to seek mandamus compelling complete (or more complete) release. Wis. Stat. §19.37(1); *see New Richmond News v. City of Richmond*, 2016 WI App 43, ¶1, 370 Wis. 2d 75, 881 N.W.2d 339 (challenging the redaction of police reports).

B. *The Assembly's redaction of the names was unlawful.*

The Assembly's overarching theory for the redaction of two names from Disputed Record #1 is identification-by-association. (Assembly Br. 40-43.) Because these two people happened to be at the same Planned Parenthood event earlier in the evening as one other witness, the theory goes, [redacted] must be de-identified so nobody can connect them to events that happened hours later, at a completely different location, after multiple intervening stops, at which they were not even present.

As noted above, there is a default presumption of a strong public interest in ***all*** public records. *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶59, 319 Wis. 2d 439, 768 N.W.2d 700 (rejecting argument that there was no public interest in certain records). Additionally, the public has an interest in knowing that legislators and government employees are attending events hosted by special-interest groups, as happened with [redacted] here.

There is no public interest in keeping these two names confidential because, as the circuit court concluded, there is no reasonable likelihood that making those names public would allow anybody to identify the Victim or witnesses. Connecting the Assembly's long series of dots requires much too

much speculation, and mere speculation over the possibility of harm is insufficient to overcome the strong presumption in favor of complete access to government records. *See MacIver*, 354 Wis. 2d 61, ¶¶23, 26.

Numerous unlikely conditions would have to be met before any person could deduce the identities of any witnesses or the Victim. Our hypothetical sleuth would have [redacted] And they would have to remember all that and be able to connect the dots nine months after the fact.

The remote possibility that, out of an extremely small group of people who might know even one of these relevant facts, some Six-Degrees-of-Separation savant might be able to draw the link to the Victim (who was not even at the Planned Parenthood event) or a witness does not create any real public interest in keeping these names confidential. If anybody could deduce those identities, it would have to be somebody with a great deal of inside information about these happenings already. And in the close-knit, gossipy culture of the Capitol that the Assembly emphasizes, such a person would likely already know or could deduce those identities from information already available to them.

Finally, even if release of these names might identify a witness who was not the Victim's employer, the question under the balancing test is not whether any negative outcome might occur, but rather whether any likely negative effects are so severe that they overcome the strong public interests in disclosure. There are several reasons why the potential harms here are minimal as well as unlikely. The privacy interest of a witness is significantly

less than that of the Victim herself, and it is not even clear what real harm attaches to the mere fact that somebody witnessed Gruszynski's behavior and did the right thing by cooperating with an investigation.

The circuit court correctly concluded that the Assembly's redaction of names violated the Open Records law.

C. *The Assembly's redaction of* [redacted] *was unlawful.*

The Assembly argues that it properly redacted the fact that Gruszynski told the LHRO he was [redacted] because that information is private medical information. The Assembly correctly acknowledges that state and federal medical privacy laws do not ***directly*** apply to bar release of this information (Assembly Br. 41 & n.3), but still claims that under the balancing test, the public interest in protecting medical information requires redaction.

The Assembly ignores the Newspapers' main argument on this point: that any public interest keeping health information private becomes irrelevant because the redacted information was ***already publicly known***. That argument alone requires the release of this information. In *Milwaukee Journal Sentinel*, the Wisconsin Supreme Court reviewed whether the balancing test precluded release of the names of hundreds of government employees represented by a particular union. 319 Wis. 2d 439, ¶¶54-67. In concluding the names could not be redacted, the Court relied on the fact that the names were already publicly available in a directory. *Id.* ¶61; *see also Linzmeyer*, 254 Wis. 2d 306, ¶37 (affirming release of report on alleged teacher misconduct despite assertion of reputational harm because many of the facts in the report were publicly known).

The redacted [redacted] information here was already known and should have been disclosed. [redacted]

[redacted]

Even were this information not publicly available, the public interest in disclosing it outweighs the public interest in nondisclosure because [redacted]

The public—and Gruszynski's constituents in particular—have a high interest in learning that [redacted]

Furthermore, there is a particular public interest in knowing not just that [redacted], but also that he ***told*** LHRO that [redacted]. Gruszynski was not explaining to human resources why a medical condition required family leave, or why a disability required a reasonable accommodation. He was offering this information as the target of an investigation into his sexual harassment of a staffer [redacted], and he could not reasonably expect this information to remain private as the Assembly contends. (Assembly Br. 42.)

This Court should affirm the circuit court's conclusion that the Assembly's redactions to the Disputed Records were excessive and an unlawful denial of the Newspapers' requests.

## III. The Newspapers are Entitled to Attorney Fees, Costs, and Statutory Damages on Both Causes of Action.

The Open Records law sets a low bar for fee recovery, which the circuit court determined the Newspapers had met under either the *Friends of Frame Park* test or the traditional "causation" test. The circuit court was correct.

### A. *Requesters who prevail in whole or substantial part are entitled to their costs of litigation*

The Open Records law's enforcement provision provides, in pertinent part:

> [T]he court ***shall award*** reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to ***a record or part of a record*** under s. 19.35 (1) (a).

Wis. Stat. §19.37(2)(a) (emphasis added). Because the use of the word "shall" in this statute is presumed to be mandatory, this statute requires that courts ***must*** award attorney fees to prevailing requesters. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 462, 555 N.W.2d 140, 144 (Ct. App. 1996).

"[T]he purpose of sec. 19.37, Stats., is to encourage voluntary compliance" by records custodians. *Eau Claire Press*, 176 Wis. 2d at 159. More generally, "an important purpose of fee-shifting statutes is to encourage injured parties to enforce their statutory rights when the cost of litigation, absent the fee-shifting provision, would discourage them from doing so." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶55, 303 Wis. 2d 258, 735 N.W.2d 93 (citations omitted). This is true under the Open Records law, even when a fee award may seem harsh. *WTMJ*, 204 Wis. 2d at 462. Meanwhile, disallowing fees "would frustrate and indeed negate the purpose of the open records law rather than encourage compliance with it." *State* ex rel. *Young v. Shaw*, 165 Wis. 2d 276, 293, 477 N.W.2d 340, 347 (Ct. App. 1991) (finding plaintiff entitled to fees when defendants voluntarily produced some of the records).

The Open Records law's fee-shifting provision in Wis. Stat. §19.37 must be liberally construed in favor of access. Wis. Stat. §19.31. Consequently, courts have found that "a court order compelling disclosure of the requested information is not a condition precedent to an award of fees." *Eau Claire Press*, 176 Wis. 2d at 160. For example, plaintiffs may obtain fees where a custodian has voluntarily produced the records after suit. *Id*.; *Racine Educ. Assoc. v. Bd. of Educ.*, 129 Wis. 2d 319, 327, 385 N.W.2d 510, 512 (Ct. App. 1986). It is immaterial for plaintiffs' ***eligibility*** for fees that they did not obtain all the records they sought. The statute does not require complete victory on every aspect of the case as a prerequisite to obtaining costs, fees and damages. Wis. Stat. §19.37(2)(a) (allowing relief to plaintiffs who prevail in whole ***or*** in substantial part); *Meinecke v. Thyes*, 2021 WI App 58, ¶8, 399 Wis. 2d 1, 963 N.W.2d 816.

Thus, in order to encourage plaintiffs to assert their rights under the law, and to vindicate the public's right to information, the Open Records law sets a low bar for obtaining costs, fees, and damages, as made clear in Wis. Stat. §19.37(2).

As described in Sections I and II, *supra*, the circuit court correctly ruled that the Assembly illegally denied the Newspapers' requests and redacted information from the records it eventually provided. The Assembly does not dispute that should this Court affirm the circuit court's ruling on the Second Cause of Action, the Newspapers are entitled to their reasonable attorney fees, costs, and statutory damages on that claim.[5] (*See* Assembly Br. 47-48.) Furthermore, the Assembly does not dispute that under the prevailing party

[5]The Newspapers agree that on remand, the circuit court may consider the reasonableness of the fees. (Assembly Br. 44.). However, the Assembly asks this Court to make rulings about that reasonableness—particularly what work the Newspapers' attorneys can include in that calculation—without benefit of factual development or full briefing. This Court should leave it to the circuit court to make those findings. *Meinecke*, 399 Wis.2d 1, ¶11 ("[O]nce eligibility for fees is determined, the circuit court exercises its discretion in determining a 'reasonable' amount.") (citing Wis. Stat. §19.37(2)(a)).

test as explained in *Friends of Frame Park*, 394 Wis. 2d 387, ¶4, should this Court affirm the circuit court's ruling on the First Cause of Action, the Newspapers are entitled to their fees on that claim as well. (*See* Assembly Br. 47-48.)

The only issue, therefore, is whether under the causal nexus test (if application of that test becomes necessary), the circuit court's finding that this lawsuit was a cause of the release of the records was correct. As the Supreme Court is likely to decide whether to affirm the prevailing party test as explained in *Friends of Frame Park* before this Court releases an opinion in this case, the Newspapers address the possibility that application of the causal nexus test may be necessary, as they did below.

B. *The Circuit Court's finding of causation was not clearly erroneous or unreasonable*

The circuit court's determination that the Newspapers' lawsuit was a cause of the records' release should be affirmed, either under the clearly erroneous test or the reasonableness test. (App.091, R.89-8.)

1. The Circuit Court's decision was not clearly erroneous.

Traditionally, the test to determine whether a party has prevailed when an authority voluntarily releases records after being sued is whether there is a causal connection between the litigant's mandamus action and the authority's ultimate compliance with the request—the "causal nexus" test. *WTMJ*, 204 Wis. 2d at 458-59. The lawsuit need only be "a cause, not ***the*** cause, of the records' release." *Id.* at 459 (emphasis in original). "The test of cause in Wisconsin is whether the actor's action was a substantial factor in contributing to the result." *Eau Claire Press*, 176 Wis. 2d at 160. "Normally, whether a party has made the requisite showing under sec. 19.37(2), Stats., is a factual determination that is within the province of the trial court." *Id.*

Here, the circuit court did not rely on inferences but rather cited to evidence that directly demonstrated that the lawsuit caused the release of these

records to the Newspapers (App.091, R.89:8.), and the clearly erroneous test should apply, *Eau Claire Press*, 176 Wis. 2d at 160. The court of appeals will not overturn an exercise of discretion unless it is clearly erroneous. "When a circuit court exercises its discretion, it must explain on the record its reasons for its discretionary decision 'to ensure the soundness of its own decision making and to facilitate judicial review.'" *State v. Scott*, 2018 WI 74, ¶38, 382 Wis. 2d 476, 914 N.W.2d 141 (quoting *Klinger v. Oneida County*, 149 Wis. 2d 838, 847, 440 N.W.2d 348 (1989)). "The circuit court's explanation on the record of its exercise of discretion must demonstrate that the circuit court examined the relevant facts, applied a proper standard of law, and used a rational process to arrive at a conclusion that a reasonable judge would make." *Id.* ¶39 (citing *Weber v. White*, 2004 WI 63, ¶18, 272 Wis. 2d 121, 681 N.W.2d 137).

Here, the circuit court found that the lawsuit had been pending for five months before the records were provided, that the redacted records were provided only to the Newspapers and not other reporters who had originally requested them (except for Ross, who made a new request), and that the Newspapers "were provided the updated response . . . only because of their status as plaintiffs in a pending case." The circuit court also found that the Assembly's request that the Newspapers "voluntarily dismiss their case" demonstrated that the records were provided "to induce dismissal of the case." All of this evidence, the circuit court found, "establish[ed] that this lawsuit was a cause of the release of records to these plaintiffs." (App.091, R.89-9.)

The circuit court's finding is not clearly erroneous. The court examined the relevant facts and applied the proper standard of law, determining whether there was sufficient evidence to establish that this lawsuit was at least ***a*** cause of the release of records. *See WTMJ*, 204 Wis. 2d at 458-59. The court's process of reasoning was rational and logical, demonstrating a clear analysis of several pieces of evidence.

This Court should apply the clearly erroneous standard and uphold the circuit court's factual finding that "this lawsuit was a cause of the release of records to these plaintiffs." (App.091, R.89:8.)

2. The Circuit Court's decision was not unreasonable.

If this Court concludes it should apply the reasonableness standard, the circuit court's ruling meets that standard as well. *See Eau Claire Press*, 176 Wis. 2d at 160.

Under the reasonableness standard, the Court of Appeals "affirm[s] the trial court's finding unless [it] find[s] that the inference drawn by the trial court may not reasonably be drawn from the established evidence." *Id.* at 160-61 (citing *State* ex rel. *Vaughan v. Faust*, 143 Wis. 2d 868, 871, 422 N.W.2d 898, 899 (Ct. App. 1988)). The evidence here can reasonably be viewed as establishing that this lawsuit was ***a*** cause, even if not the sole cause, of the Assembly's release of records to the Newspapers.

First, the simple fact of the Assembly's initial denial of Newspapers' requests demonstrates that the lawsuit was a substantial factor in the release of the records. This is not a case of mere delay where a plaintiff may have prematurely filed a suit without waiting a reasonable amount of time. *E.g.*, *Racine Educ. Ass'n*, 145 Wis. 2d at 523-24 (finding custodian's delay was "unavoidable"). Rather, this is a case where the requests were denied and the Newspapers' only legal recourse was filing suit. *See Capital Times Co. v. Doyle*, 2011 WI App 137, ¶1, 337 Wis. 2d 544, 807 N.W.2d 666 (mandamus is the exclusive means to enforce the Open Records law). This suit was necessary in order to obtain the records. *See Eau Claire Press*, 176 Wis. 2d at 160 (asking whether a lawsuit "could reasonably be regarded as necessary to obtain the information").

Second, the letter accompanying the redacted records provided to the Newspapers shows the clear connection between the lawsuit and the release of the records. The release letter was sent by the Assembly's litigation counsel to

the Newspapers' litigation counsel. (App.049, R.38:47.) The subject of that letter was "Wisconsin State Journal, et al. v. Patrick Fuller, et al., Case No. 20CV764." (App.091, R.38:47.) As the circuit court noted (App.051, R.89:8), that letter expressly requested that the Newspapers "voluntarily dismiss their case." (App.091, R.38:49.) The circuit court reasonably concluded the Assembly was providing the records to induce the Newspapers to dismiss their case (R.89:8), without challenging the redactions or seeking fees. The Assembly's letter would not have been written this way if this lawsuit did not exist.

Third, clear evidence of a causal nexus exists in the Assembly's disparate compliance with the requests of litigant requesters as opposed to non-litigant requesters. The Newspapers made some, but not all, of the initial requests to the Assembly for records related to the complaint and investigation. (App.006-007, R.38:4-5.) Requests for the same records were also made by three other reporters—St. Hilaire, Jacobo, and Ross. (R.60:32-34, 36; 4-5; 62:2.) In response to those initial requests, the Assembly provided the same response to all requesters: a copy of the Summary and no records. (App.018, R.38:16; App.066, 46:15; 60:33-34, 36; 62:2.)

The Newspapers were provided copies of the redacted Disputed Records in August 2020. (App.049-051, R.38:47-49.) But the Newspapers were the ***only*** requesters who received any records in response to their original requests. The Assembly never provided those records to Jacobo or St. Hilaire. (R.60:4.) Ross received a copy from Jorgenson (accompanied by a new response letter), but only ***after he made a renewed request***. (R.74:1, 4-6.)

This disparate treatment demonstrates that filing this lawsuit was not only a cause, it was the ***primary*** cause for the Newspapers eventually receiving the records they requested. The only difference between St. Hilaire and Jacobo on the one hand and the Newspapers on the other is that the Newspapers filed this lawsuit. And none of the Newspapers had to re-request those records to

obtain them like Ross, so the Assembly cannot point to such a request as an intervening cause of the release.

All the evidence strongly suggests that if the Newspapers had not filed this lawsuit, they would not have received the records. As the circuit court concluded, "this lawsuit was a cause of the release of records to these plaintiffs." (App.091, R.89:8.) The Assembly's claim that "there is no evidence—aside from the mere fact the lawsuit was pending—that the lawsuit caused the LHRO to release the Disputed Records" (Assembly Br. 45) is thus blatantly false.

The Assembly argues that the circuit court created a rule that custodians cannot release records to requester-plaintiffs who do not make a new request without becoming liable for fees. (Assembly Br. 45-46.) Yet the circuit court did not create such a rule and did not focus on that singular question. That consideration was only one of three pertinent pieces of evidence the circuit court considered when making its causality ruling. (App.091, R.89:8.) And the Assembly ignores that other requesters—who did ***not*** file lawsuits—did not get records.

The Assembly next argues that the circuit court's decision runs afoul of the "rule" that mere filing and release does not establish causation. (Assembly Br. 46.) But the Assembly ignores that while filing followed by release does not ***conclusively*** establish causation, it can create an ***inference*** of causation that can, in some circumstances, be enough for a finding that the plaintiff prevailed. *See, e.g.*, *State* ex rel*. Faust v. Vaughan*, 143 Wis. 2d 868, 872, 422 N.W.2d 898, 899 (Ct. App. 1988) (filing followed by release created inference of causation); *see also Friends of Frame Park*, 394 Wis. 2d 387, ¶27 (causation can "typically be inferred"); *WTMJ*, 204 Wis. 2d at 460 (filing followed by release can create an inference of causation and custodian must show that a "lawsuit was *not* a cause of the document's release") (emphasis in original). Such is the case here.

Lastly, the Assembly claims the circuit court's logic would lead to absurd results because custodians who correctly rely on an exception to deny a request and later release records due to changed circumstances (but after a lawsuit is filed) would still be liable for fees. (Assembly Br. 46.) There is no "absurd result" here, because Newspapers do not claim that every time a custodian voluntarily provides records after suit is filed to a requester who did not make a renewed request, the custodian is liable for the requester's fees. There are numerous facts and factors that can be considered, and the Newspapers argue only that the unique factors of ***this*** case demonstrate that this lawsuit was a substantial factor in the release of the records to the Newspapers.

Even if there were other conclusions that could be drawn from the evidence, the conclusion the circuit court reached is a reasonable one and should be affirmed.

## CONCLUSION

The Newspapers respectfully request that this Court affirm the circuit court in full.

Respectfully submitted this 30th day of November, 2021.

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,998 words.

Dated this 30th day of November, 2021.

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